U.S. Department of Labor

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Issue Date: 02 May 2003

CASE NO.: 2002-LHC-01741

OWCP NO.: 03-27603

In the Matter of:

JAMES DONAHUE,

Claimant,

v.

NOVOLOG BUCKS COUNTY, INC.,

Employer,

and

SIGNAL MUTUAL INDEMNITY,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS ("OWCP"),

Party-in-Interest.

Appearances: Daniel Boyce, Esquire, For Claimant; Francis Womack, Esquire, For Employer

Before: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER
AWARDING BENEFITS

I. INTRODUCTION/PROCEDURAL HISTORY

This is a claim for permanent partial disability ("PPD") benefits under Section 8 of the Longshore and Harbor Workers' Compensation Act ("LHWCA"). 33 U.S.C. § 908.

A hearing was held before me on 13 November 2002 in Cherry Hill, New Jersey. At that time, I heard testimony from four witnesses: Claimant's parole officer, Edward McGuire; an agent for the Employer, Beth Straw-Thomas; Employer's vocational expert, Cheryl Duncan; and Claimant's vocational expert, Rosalyn Pierce. The hearing was continued on 23 December 2002 in Philadelphia, Pennsylvania at which time I heard additional testimony from Cheryl Duncan and testimony from the Claimant.[1]

On 21 February 2003 the Party-in-Interest sought leave to file a brief addressing Claimant's right to Department of Labor ("DOL") sponsored vocational rehabilitation, which I subsequently granted on 24 February 2003. Claimant and Employer filed briefs by 24 February 2003, and by 28 February 2003 the Party-in-Interest indicated it would not file a brief having received Claimant's brief and concurring with Claimant's conclusion on the vocational rehabilitation issue.

II. STIPULATIONS

The parties stipulate and I find as follows:

1. The date of injury was 28 April 2000.
2. The description of the injury is an injury to the right shoulder.
3. The parties are subject to the LHWCA.
4. An employer/employee relationship existed at the time of the injury.

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[1]The transcript of the 13 November and 23 December 2002 hearing will be cited as "Tr.–." At the time of the 13 November 2002 hearing, Claimant submitted 28 exhibits which were received into evidence and marked as "CX1-CX28." At the time of the 23 December 2002 hearing Claimant submitted the transcript from the 20 November 2002 deposition of Dr. Martin Cohen. It was marked and received into evidence as "CX29." Four administrative law judge exhibits were marked and received as "ALJX1-ALJX4." (Tr. at 10.)

During the first day of testimony, Employer submitted an exhibit binder with exhibits marked "EX1 - EX56." After carefully scrutinizing Employer's exhibits, I find no discernable difference between CX1 through CX28 and EX1 through EX55. They are the same. I will therefore cite to the exhibits marked CX1 through CX28. EX56 has been divided into subparts, (a) - (o). EX56(h) and EX56(k), however, are absent from Employer's exhibit binder.

5. The injury arose in the course and scope of employment.
6. The Employer was timely notified of the injury on the date of injury.
7. The notice of injury was timely filed.
8. The notice of controversion was filed on 4 April 2002.
9. Informal conferences were held on 27 December 2001 and 20 March 2002.
10. Medical benefits were paid under Section 7 of the LHWCA.
11. Temporary total disability benefits were paid from 29 April 2000 to 14 February 2002 at the rate of $518.60 per week.
12. Claimant's average weekly wage ("AWW") is $777.90.[2]
13. Claimant is permanently disabled.

(Tr. at 4-6.)

III. ISSUES

The following issues are presented for resolution:

1. The extent of Claimant's disability.
2. Whether Employer is liable for future medical treatment.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Factual Statement/Summary of Evidence

1. *Claimant and His Medical Treatment Following the Injury*

Claimant

Claimant is a 32-year-old longshoreman who injured his right shoulder on 28 April 2000. (CX1.) He was attempting to throw a rope to a docking vessel at Employer's shipyard. (Tr. at 276.)

Claimant is a convicted felon. (Tr. at 251.) Apparently Claimant was arrested and charged with kidnaping, possession of an instrument of crime, terroristic threats, simple assault, and unlawful restraint. (Tr. at 251.) On 19 April 1993, Claimant was tried and convicted of at least one of these charges and was incarcerated until 17 March 1998. (Tr. at 252.) Upon his release, he was placed on parole and applied for a position with Employer. (Tr. at 252-254.) Claimant's 2 June 1998

[2]Although the parties stipulated to this figure at the time of the 13 November 2002 hearing (Tr. at 6), I note that these parties had previously litigated this issue before me and I found that Claimant's AWW was $777.90. *Donahue v. Novolog Bucks County*, 2001-LHC-02396 (ALJ Mar. 20, 2002).

application clearly states that he was convicted of a felony. (CX18.) He discussed the circumstances of the conviction during his interview with Employer. (Tr. at 255-256.) Claimant earned $13.00 an hour working for Employer. (Tr. at 259.) He testified that he has not received any medical benefits from Employer since February of 2002[3] and that since that time he has made efforts to find work. (Tr. at 268-269.) From April to August 2002, after getting permission from his parole officer, Claimant worked for Hubby Hands in Lehigh County earning $8.00 an hour. (Tr. at 270.) Currently Claimant is attempting to start his own handyman business. (Tr. at 270-272.)

During the 13 November 2002 hearing, I heard testimony from Claimant's parole officer, Edward McGuire. (Tr. at 12.) Mr. McGuire testified that he restricts all parolees under his supervision to Bucks County. (Tr. at 15.) He testified he would not allow Claimant to go to Philadelphia or the Lehigh Valley area for employment. (Id.) He testified that Claimant was a high risk to work in either Philadelphia or the Lehigh Valley area. (Tr. at 18-19.) He testified that he initially approved of Claimant's employment with Hubby Hands in Lehigh County but revoked that approval on or about 28 August 2002.[4] (Tr. at 19-20.) On cross-examination, Mr. McGuire testified that the actions that restricted Claimant from Center City Philadelphia and Lehigh County are actions which occurred after his incarceration. (Tr. at 24.)

Claimant's Medical Treatment Following the 28 April 2000 Injury

On 29 April 2000 Claimant received emergency room treatment at Lower Bucks Hospital. (CX1.) On 1 May 2000, Dr. Lawrence Axelrod assessed Claimant's condition, finding that he had a right shoulder strain and sprain and a possible AC separation. (CX2.) Dr. Axelrod restricted Claimant's work duties. (Id.)

Shortly thereafter, Claimant came under the care of Orthopedic Surgeon Martin A. Cohen. (CX3.) Dr. Cohen evaluated Claimant's condition several times between 3 May 2000 and 30 August 2001. (Id.) During that time, Dr. Cohen limited Claimant's lifting, bending, squatting, climbing, kneeling and twisting. (Id.) He further opined that Claimant's lifting was limited to 10 pounds and that he could not reach above the shoulder. (Id.) Dr. Cohen gave deposition testimony on 20 November 2002. (CX29.)

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[3]Claimant last saw Dr. Cohen in August of 2001 and has not been approved for pain medication since that time. (Tr. at 277.)

[4]Claimant's 1993 conviction involved the abduction of a woman with whom he had a relationship. Mr. McGuire testified that he revoked Claimant's permission for the Hubby Hands job, because Claimant had established a relationship with a woman in the Lehigh Valley area that went sour. (Tr. at 19.) This relationship(s), which involved a woman who was not the complainant in the criminal case, precluded Claimant from traveling to either Center City Philadelphia or the Lehigh Valley area for employment. (Tr. at 24-25, 254.)

At deposition, he testified that he performed surgery on Claimant's right shoulder on 17 July 2000. (CX29 at 14.) He further testified that he performed a second surgery on 11 October 2000. (CX29 at 18.) By the time of his 18 December 2000 examination, the doctor had referred Claimant to an anesthesiologist for pain management. (CX29 at 19.) By 23 April 2001 Dr. Cohen had diagnosed brachial plexopahty and adhesive capsulitis and was convinced Claimant had reached maximum medical improvement with respect to that condition.[5] (CX29 at 20-24, CX3.) He therefore put permanent work restrictions on Claimant. (CX29 at 24.) During the course of his treatment, Dr. Cohen referred Claimant to other physicians, both in consultation and for additional treatment.

Dr. Gerald R. Williams prepared a report of examination dated 2 November 2000. (CX9.) Dr. Williams diagnosed adhesive capsulitis and possible early reflex sympathetic dystrophy. (CX9 at 2.) Dr. Williams did not recommend any further surgical intervention but was concerned about controlling Claimant's pain. (CX9 at 3.) He referred Claimant to a pain clinic.

Eventually Claimant came under the care of anesthesiologist Sofia Lam. In a report of examination dated 13 November 2000 Dr. Lam proposed a series of injections to treat Claimant's pain. (CX10.) In a 7 September 2001 report, Dr. Lam reported having performed the injections, which yielded only "temporary improvement." (Id.) She also reported her agreement with Dr. Cohen that the patient had reached "maximum medical improvement in terms of the surgical treatment." (Id.) Dr. Lam, despite a poor prognosis, was hopeful for treating the pain with nerve blocks and pharmacological control. (Id.)

Other doctors who evaluated Claimant following his injury were as follows: Dr. Steven Mandel, Dr. Dennis J. Bonner, Dr. John Fenlin, Dr. John Park, and Dr. Donald F. Leatherwood.

On 29 November 2000, Dr. Steven Mandel reported his findings upon examination. (CX11.) He concluded that there is "evidence of right brachial plexopathy." (Id.)

On 27 June 2000, Dr. Bonner reported his findings upon examination. (CX12.) The doctor diagnosed "severe persistent right shoulder tendinitis, possible adhesive capsulitis, and possible tear of the rotator cuff and/or labrum." (Id.) Dr. Bonner further thought that surgical intervention was a reasonable approach. (Id.)

In a report dated 9 March 2001 Dr. Fenlin opined that Claimant is totally disabled relative to the use of his right upper extremity and did not "anticipate improvement in his disability state in the near future." (CX13.)

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[5]Dr. Cohen was likewise clear that Claimant's permanent disability was caused by the 28 April 2000 injury. (CX29 at 27.)

Having reviewed various documents, Dr. Park noted that all doctors agreed that Claimant has "brachial plexopathy," but opined that Dr. Lam's injection therapy was unreasonable and unnecessary. (CX14.) The doctor went on, "[a] similar injection therapy by Dr. Sofia Lam in the future would be unreasonable and medically unnecessary." (Id.)

Finally, Dr. Leatherwood, in a report of examination dated 28 January 2002, diagnosed "status post right shoulder injury, with a mild brachial plexus stretch," for which "he has reached a state of maximum medical improvement." (DX15.) He opined that Claimant "can work on a full time, light duty basis."

2. *The Usual Requirement of Claimant's Employment*

Claimant submitted a job description from Employer which laid out the normal duties of a longshoreman at Employer's place of business. (CX16.) Claimant also testified concerning his normal duties as a laborer/worker. (Tr. at 259.) Part of his duties included "reaching, pulling, pushing." (Tr. at 261.) Claimant explained that he felt that he could no longer do his job as a longshoreman, because it is a very physically demanding job that requires a lot of reaching and climbing. (Tr. at 264-265.)

3. *Vocational Evidence*

Cheryl H. Duncan - Employer's Vocational Expert

On 6 August 2001, Ms. Duncan prepared a vocational claim profile for Claimant. (EX56(b).) In that report, she identified Claimant's medical/functional status, his prior education, and his employment history. (Id.) In a report dated 28 September 2001, she identified 10 positions, which were as follows:

1. machine operator at Allcams Machine ($320-400/week);
2. mail opener at HCI Direct Inc. ($9-10/hour);
3. front desk agent at Wyndham Franklin Plaza ($480/week) (Philadelphia);
4. machinist at Pioneer Machine ($320/week);
5. customer service representative at Comcast ($10.60/hour) (Philadelphia);
6. concierge at Renaissance Philadelphia Hotel ($360/week) (Philadelphia);
7. parking attendant director at Crowne Plaza Hotel ($400-800/week) (Philadelphia);
8. customer service representative at Gallagher Fluid Seals ($29,000-40,000/year);
9. sales representative at Strategic Products & Services ($40,000-50,000/year);
10. customer service representative at Matheson Tri Gas ($30,000-60,000/year).

(EX56(c).) Using these jobs, Ms. Duncan computed an AWW of $531.85. (Id.) On 7 January 2002, Ms. Duncan began vocational placement services. (EX56(g).) In a vocational report dated 8 March

2002, she reported that she had scheduled dates for Claimant to apply at Pioneer Machine, Go Internet.net, and Strategic Products & Services but that for one reason or another Claimant did not show up for the appointments. (EX56(i).) In a vocational report dated 9 April 2002, she reported having scheduled an appointment for Claimant to apply at Strategic Products & Services again but that Claimant applied 3 hours early and wore sweat pants.[6] (EX56(j).) In a vocational report dated 7 June 2002, she reported having scheduled an appointment for Claimant to apply at McCafferty Auto Sales but that Claimant did not apply. (EX56(l).) This same report also stated that Claimant "has returned to work at an employer called Hubby Hands … located at P.O. Box 7, Bath, PA 18014." (Id.)

Ms. Duncan was also called as a witness and testified before me during both hearings on this claim. (Tr. at 78.) A large part of her testimony rehashed much, if not all, of what was written in her various labor reports. Ultimately, she opined that Claimant could earn an AWW of $531.85. (Tr. at 122.) She computed this figure by taking the average of the ranged salaries, adding those to a weekly computation of the yearly salaries, and dividing by ten.[7] (Tr. at 122-125.) Ms. Duncan admitted that she computed the salaries in September 2001 dollars. (Tr. at 125-126.)

For many of the jobs identified in her September 2001 report, placement was not possible: Allcams was not hiring, she never followed-up with HCI, the Wyndham Franklin was not hiring, she never followed-up with Comcast, and she never followed-up with Gallagher Fluid or Matheson Tri-Gas. (Tr. at 130-131.)

Rosalyn Pierce - Claimant's Vocational Expert

In a Vocational Rehabilitation Evaluation dated 25 September 2002, Rosalyn Pierce offered her expert opinion concerning Claimant's employability. (CX17.) Ms. Pierce concluded that Claimant could perform a full range of sedentary work and a partial range of light work. (CX17 at 9.) Having examined the evidence from Ms. Duncan, Ms. Pierce opined that the positions listed were not a representative sample of salaries Claimant could command. (CX17 at 9.) She noted that there was no consideration given to his criminal conviction, and several of the jobs were not correctly classified. (Id.) Ultimately, she stated that "the average weekly wage in the amount of $531.65 is inaccurate," whereas "an average weekly wage in the amount of $320.00 is more realistic given today's economy and in light of [Claimant's] vocational profile." (CX17 at 10, Tr. at 164.)

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[6]Also submitted during the hearing was Claimant's application to Strategic Products & Services, which clearly stated Claimant's prior convictions and the fact that he was incarcerated between April 1993 and March 1998. (EX57.)

[7]*E.g.*, if the job paid $8-10 an hour, she would add 8 to 10 and divide by two to obtain the salary. She would then multiply by 40 to get a weekly figure. (Tr. at 123.) When the job specified an annual salary she would divide by 52 to obtain a weekly figure. (Id.)

Ms. Pierce gave testimony before me at the time of the 13 November 2002 hearing. She testified that she interviewed Claimant, that Claimant's work duties at Employer's business were heavy, and that Dr. Cohen's work restrictions precluded Claimant's longshore work. (Tr. at 152-154.) She also testified to having seen Dr. Lam's restrictions, which also precluded Claimant's prior work. (Tr. at 154-155.) With regards to the opinion of Cheryl Duncan, she opined that Claimant could do some of the jobs she identified but not all of them. (Tr. at 157-158.) She further opined that the AWW figure of $531.85 is skewed, because Claimant could not obtain the last three jobs that Ms. Duncan identified. (Tr. at 159.)

Ms. Pierce opined that the parking attendant supervisor position at Crowne Plaza was unrealistic. (Tr. at 159-160.) She testified to having contacted Allcams who told her that Claimant's salary there would have been less than $320.00 a week. (Tr. at 160.) She testified that the position at the Wyndham Franklin Plaza would have paid "$400 a week versus the $480 that was documented." (Tr. at 161.) She followed-up with the people at Pioneer Machine Company and discovered that "they were very slow and they were not hiring, and did not anticipate having any openings." (Tr. at 162.) The next position that Ms. Pierce reviewed was with the Renaissance Philadelphia Hotel, which she said was hiring for positions that paid $9 an hour. (Tr. at 162.) She followed-up with the people at Strategic Products & Services; Don Cosma, a sales manager, told her that "he would not hire an applicant with a criminal record . . . [and that] the salary is 100 percent commission." (Tr. at 162-163.) She opined that, for this job, Claimant was not qualified and would have been rejected had he submitted an application. (Tr. at 163.) She also opined that the positions with Gallagher Fluid Seals and Matheson Tri-Gas would not be realistic for Claimant. (Tr. at 164-165.)

B. Discussion

1. Claimant's Wage-Earning Capacity

To establish a *prima facie* case for total disability, the claimant must make a preponderant showing that he cannot return to his regular or usual employment due to his work related injury. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1997). The judge must compare the claimant's medical restrictions with the specific requirements of his usual employment. *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). "Usual" employment is the claimant's regular duties at the time he was injured.

If the Claimant makes this *prima facie* showing, the burden shifts to employer to show suitable alternative employment ("SAE"). *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988). The employer is not required to act as an employment agency for the claimant; it must, however, prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981).

At the time of Claimant's injury he was performing very physically demanding work. Following that injury, Dr. Cohen and Dr. Lam put various work restrictions on Claimant. Ms. Pierce was very clear that these restrictions prevented Claimant from engaging in his former longshore work. I thus find that Claimant has made a *prima facie* showing of total disability. I must now decide whether Employer has shown the availability of SAE.

Employer has clearly shown the availability of SAE in this case. The evidence does not support a conclusion that Claimant is incapable of any work nor does Claimant make such a contention. Rather, the dispute here centers on whether the jobs identified by Employer's vocational expert are realistic and available. *See Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988) (for the job opportunities to be realistic, . . . , the employer must establish their precise nature, terms, and availability). In identifying what jobs are realistic and available, I must determine whether Claimant's parole restrictions affect that determination.

Employer relies on *Livingston v. Jacksonville Shipyards, Incoporated,* 32 BRBS 123 (1998), to support its argument that Claimant's parole restrictions do not make the positions unavailable. Employer argues that the positions its vocational expert identified in Philadelphia and the Lehigh Valley area should be included in the wage-earning capacity determination. Relying on *Hairston v. Todd Shipyards Corporation*, 849 F.2d 1194 (9th Cir. 1988), Claimant would have me exclude the employment in the restricted locations from consideration in the wage-earning capacity analysis.

In *Livingston*, the ALJ had concluded that certain jobs requiring a driver's license constituted SAE, notwithstanding the fact that "after his injury but prior to the date of maximum medical improvement and before the showing of suitable alternate employment, claimant's driver's license was suspended for five years as the penalty for two driving-under-the influence (DUI) convictions." 32 BRBS at 124. The BRB affirmed, holding "that employer has satisfied its burden of establishing the availability of suitable alternate employment by presenting evidence of jobs which are suitable and available given claimant's background and physical limitations." *Id.* at 125. The BRB distinguished the case from *Hairston*,

> Unlike the situation which arose in *Hairston*, claimant's convictions in this case did not occur prior to his injury. Thus, the convictions were not a prior impediment to claimant's obtaining employment otherwise suitable for him. Moreover, the criminal conviction[ ] in *Hairston* . . . forever prohibited the claimant[] from obtaining the submitted bank [] position[]. Here, however, claimant's license was suspended only temporarily. … within a reasonable period after the jobs were identified claimant's prohibition from driving ended, rendering the positions suitable and available.

Id. at 3.

In *Hairston*, the ALJ concluded that the employer had failed to demonstrate SAE. 849 F.2d at 1195. To show SAE, the employer relied solely on the fact that claimant had obtained a brief maintenance position with a bank after he was injured. *Id.* The claimant was fired from the position

after an FBI search uncovered a prior criminal record for shoplifting. *Id.* "The ALJ held that, because of his past criminal record, a position in a bank was never realistically available to Hairston." *Id.* The Ninth Circuit adopted the ALJ's conclusion on the grounds that the bank position was not realistically available to claimant: "Like a limitation of education or literacy, Hairston's criminal record was incurred well before his injury, not in contemplation of it. No matter how diligently he tried, Hairston could have done nothing to overcome the disqualifying effect of his record." *Id.* at 1196.

Here, the record is not entirely clear whether it was Claimant's prior conviction alone that caused his parole officer to impose the limitation on his travel to the Philadelphia and Lehigh Valley area or whether it was a combination of the prior conviction and Claimant's conduct following the injury. There certainly has been some suggestion that it was Claimant's conduct following the injury. Nevertheless, Mr. McGuire was unequivocal when he stated that all parolees under his supervision are not allowed to leave Bucks County. (Tr. at 15.) If not due solely to his prior conviction, Claimant's conviction at least played a major role in Mr. McGuire's decision to limit Claimant's travel. This case is far more similar to *Hairston* than *Livingston*.

Claimant's felony conviction(s) were incurred prior to his employment with Employer. Unlike in *Livingston,* where the claimant would eventually be able to take positions that require a driver's licence, Claimant will always have the taint of having been a convicted felon. Therefore, I find that positions of SAE located in Philadelphia and the Lehigh Valley area are not realistically available to Claimant. I will not use them in the SAE analysis.

Employer acknowledges that some of the positions identified by Ms. Duncan are unrealistic but still argues that Claimant's wage-earning capacity is $576.92 a week. (Employer's Brief, p. 24-25.) Claimant, on the other hand, contends that he has a wage-earning capacity of not more than $320.00 a week. (Claimant's Brief, p. 13, 16.) The calculation of wage-earning capacity requires that I determine which jobs identified by Ms. Duncan are realistic. I will analyze the positions on a case-by-case basis.

1. Machine Operator at Allcams Machines ($320-400/week). Based on the testimony of both Ms. Duncan and Ms. Pierce, I find that Claimant could earn $320.00 a week at that position.
2. Mail Opener at HCI Direct Inc. ($9-10/hour). Based on Ms. Duncan's testimony at the time of the formal hearing, I find that Claimant could earn $360.00 a week at this position.
3. Front Desk Agent at Wyndham Franklin Plaza ($480/week) (Philadelphia). Because of Claimant's parole restrictions, I find that this position is not realistically available.
4. Machinist at Pioneer Machine ($320/week). Claimant testified that he filled out an application with this employer but that he was advised that he was not qualified for the position. Ms. Pierce confirmed that business was slow at this company. Notwithstanding this evidence, I find that this position is

realistically available to Claimant and he could earn $320 a week at this position.

5. Customer Service Representative at Comcast ($10.60/hour) (Philadelphia). Because of Claimant's parole restrictions, I find that this position is not realistically available.
6. Concierge at Renaissance Philadelphia Hotel ($360/week) (Philadelphia). Because of Claimant's parole restrictions, I find that this position is not realistically available.
7. Parking Attendant Director at Crowne Plaza Hotel ($400-800/week) (Philadelphia). Because of Claimant's parole restrictions, I find that this position is not realistically available.
8. Customer Service Representative at Gallagher Fluid Seals ($29,000-40,000/year). Claimant argues that I should credit Ms. Pierce's opinion over Ms. Duncan's, because Ms. Duncan is pro-employer, has testified inconsistently, and was inaccurate in her report. Employer argues that I should not discount Claimant's intelligence, his good appearance, his solid speaking ability, and his motivation. Because Ms. Duncan's creditability was called into question several times, I give her testimony on this score little weight. I therefore find that this position is not realistically available to Claimant.
9. Sales Representative at Strategic Products & Services ($40,000-50,000/year). Ms. Pierce testified that she spoke to the sales manager at this company and was advised that they would not hire an applicant with a criminal record. I therefore find that this position is not realistically available to Claimant.
10. Customer Service Representative at Matheson Tri Gas ($30,000-60,000/year). Ms. Duncan believed that Claimant would not earn more than $30,000 per year at this position. (Tr. at 230-231, 249-250.) Ms. Pierce opined that the position was not appropriate for Claimant. (Tr. at 165.) As mentioned above, because Ms. Duncan's creditability was called into question at the time of the formal hearing, I give her testimony on this score little weight. I therefore find that this position is not realistically available to Claimant.

I find the fairest method for determining Claimant's wage-earning capacity is to take the average salary of the jobs which are realistically available to Claimant. *See Avondale Indus. Inc. v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1998) (affirming an ALJ's decision to average the hourly wages of jobs employer's rehabilitation counselor identified). Therefore, I calculate Claimant's wage-earning capacity as follows:

$320.00 (Allcams)
$360.00 (HCI Direct)
+ $320.00 (Pioneer)
$1000.00
/3
= $333.33 per week

However, as Claimant correctly recongnizes, this $333.33 per week figure is not an accurate statement of Claimant's wage-earning capacity. Claimant would have me adjust this figure downward by 7% to account for inflation since 28 April 2000, the time of his injury. *Quan v. Marine Power & Equip. Co.*, 30 BRBS 124, 127 n.3 (1996). I calculate Claimant's PPD award as follows:

$333.33 (weekly wage-earning capacity as of 28 September 2001[8])
– $23.33 (7%[9] of $333.33)
$310.00 (Claimant's wage-earning capacity as of 28 September 2001)

$777.90 (AWW)
– $310.00 (Claimant's wage-earning capacity)
$467.90
x $66^{2}/_{3}\%$
$311.93 (Claimant's PPD compensation rate under 33 U.S.C. § 908(c)(21) commencing 28 September 2001)

2. Employer's Liability for Future Medical Treatment

Section 7(a) of the LHWCA provides, "[t]he employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). A claimant has established a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984). A judge has no authority to deny a medical

[8]"[A]n injured employee's total disability becomes partial on the earliest date that employer shows suitable alternate employment to be available." *Rinaldi v. Gen. Dynamics Corp.*, 25 BRBS 128, 131 (1991). The Employer first showed SAE to be available with Ms. Duncan's 28 September 2001 report. (EX56(c).)

[9]As of 28 September 2001, the NAWW had increased 7% from 28 April 2000. Claimant reaches 7% by referring to Department of Labor Records. I take notice that between 28 April 2000 and 28 September 2001, the NAWW increased 7%. *National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases (Section 10(f)), available at* http://www.dol.gov/esa/owcp/dlhwc/NAWWinfo.htm.

expense on the ground that a physician's expertise, customary fees, or result of treatment were not documented. *Id.* at 257. In order for a medical expense to be assessed against the employer, however, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).

Here, Claimant seeks an order "requiring the employer to honor his claim for future medical care to include an evaluation by a shoulder specialist and an evaluation by 'another pain specialist, who can start with the appropriate treatment for brachial plexopathy.'" (Claimant's Brief, p. 18, citing CX14.) Employer does not contest treatment but asks only that no additional treatment for pain management be authorized with Dr. Lam, because Dr. Lam wants to treat Claimant's condition as a cervical condition. (Employer's Brief, p. 34.)

Upon review of the evidence of record, I find that it overwhelmingly supports the conclusion that Claimant's condition requires the care of a pain management specialist. (CX3, CX11, CX13, CX14, CX15.) Such care is both reasonable and necessary. Because I fail to see a dispute here, I will grant the requested relief, provided that Claimant seeks care with a pain specialist other than Dr. Lam.

3. Claimant's Entitlement to DOL Sponsored Vocational Rehabilitation

Claimant no longer contests this issue having recognized that Sections 39(c)(1) and 8(g) of the LHWCA require that the Claimant be receiving compensation under a continuing award in order to receive vocational rehabilitation services. 33 U.S.C. §§ 908(g), 939(c)(1); *see also Cooper v. Todd Pacific Shipyards Corp.*, 22 BRBS 37 (1989). I therefore need not resolve this issue.

ATTORNEY'S FEE

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer. Claimant's attorney has not submitted his fee application. Within fourteen days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's counsel who shall then have ten days to comment thereon. The postmark shall determine the timeliness of any filing. I will consider only those legal services rendered after the date of referral to this office. Services performed prior to that date should be submitted to the District Director for his consideration.

ORDER

It is hereby **ORDERED**,

(1) Employer shall pay TTD from 29 April 2000 to 28 September 2001;

(2) Employer shall pay PPD at the rate of $311.93 per week from 29 September 2001 to the present and continuing;

(3) Employer shall take credit against payments ordered at parts (1) and (2) above for all previous payments made to Claimant;

(4) Employer shall provide all reasonable and necessary medical expenses under Section 7 of the LHWCA to Claimant for treatment of the shoulder condition, provided that treatment for pain related to such condition is provided by a physician other than Dr. Lam;

(5) Employer shall pay Claimant's attorney's fees and costs to be established in a supplemental order.

A

RALPH A. ROMANO
Administrative Law Judge